

M E M O

TO: Members of the Indiana Commission on Mental Health
FROM: Richard D. Culver, Judge, Hancock Circuit Court
DATE: October 7, 2004
**RE: Report of the Commission on Mental Health Work Group on the
Seizure of Firearms/Weapons From the Mentally Ill**

Meeting date: September 29, 2004

Meeting time: 1:30 p.m.

Meeting place: State House, Room 156A, West Washington Street, Indianapolis,
IN

Commission Members present: Richard D. Culver and Abigail Flynn

The work group of the Commission on Mental Health met September 29, 2004 to discuss proposed legislation dealing with the seizure of firearms/weapons from the mentally ill. Commission members Richard D. Culver and Abigail Flynn were in attendance. Members of the public appeared and presented their views on the topic. This report follows:

Discussion Points.

There was a general consensus of those in attendance at the meeting that police officers should be authorized to seize weapons from the mentally ill. It was further the recommendation of the group that the Commission on Mental Health explore possible legislation that would balance the interest of the public (authorizing the police to seize firearms/weapons from the mentally ill) with the interest of the individual (allowing gun owners, whether they are the person from which the weapon was seized or not, to have prompt access to the judicial system to have the weapon returned).

Commission member Abigail Flynn also raised the issue that in addition to seizing firearms from mentally ill individuals, the Commission should address the need for court ordered outpatient services and the lack of available bed space for mentally ill patients. Members of the public echoed Commission member Flynn's comments with the following observations:

- a) A request for court ordered outpatient services.
- b) Increasing hospital beds for the mentally ill will save lives.
- c) Confiscating weapons is important, but fails to address the problems caused when the mentally ill are denied access to quality treatment.
- d) Members of the public expressed concern over the recent 25% cut in Medicare funding for inpatient care.

It was noted that the above comments, although noteworthy, were beyond the parameters of the work group's stated purpose. At the request of Commission member Abigail Flynn, a guide to Kendra's Law and an article on Florida's Assisted Outpatient Treatment Law was forwarded to the full Commission for review.

With respect to the issue of seizing firearms/weapons from the mentally ill, it was agreed to forward proposed legislation to the full Commission for further review and comment. A suggested rough draft of possible legislation is attached hereto. With respect to the proposed draft, the following questions were raised:

I. Firearms, weapons, deadly weapons: what should be subject to seizure by the police?

"Weapon is not defined by statute and therefore the phrase could be considered overly broad and so vague as to present a possible constitutional challenge.

"Deadly weapon is defined by I.C. 35-41-1-8 as:

- 1. A loaded or unloaded firearm.
- 2. A weapon, device, tazer, equipment, chemical substance, or other material that in the manner it is used, or could ordinarily be used or is

intended to be used, is readily capable of causing serious bodily injury.

3. An animal that is

- a) Readily capable of causing serious bodily injury; and
- b) Used in the commission or attempted commission of a crime.

In interpreting this section the Indiana Supreme Court has said that an automobile, pair of scissors, firearm, steel screw driver, a bb gun, fan belt and flashlight may be considered deadly weapons.

I.C. 35-47-1-5 defines “firearm” as any weapon that is capable of, or designed to, or that may be readily be converted to expel a projectile by means of an explosion.

Using an extremely broad definition such as weapon, would authorize a police officer to confiscate anything used, or intended to be used, by the individual to cause serious bodily injury, including knives, baseball bats or other objects.

The proposed draft suggests using the phrase “firearm”, recognizing that although other objects can be deadly weapons, it may be too impractical and overreaching to allow the seizure of other property under an overly broad definition.

II. Intended scope of the legislation.

The intended scope of the attached draft is to deal with situations in which the officer has:

- a) Direct conflict with the mentally ill patient and has seized a firearm from the mentally ill person or from the area within the person’s immediate access and
- b) With situations in which the officer is granted permission to enter the premises by a homeowner (such as a family member that would give law enforcement permission to enter their home to seize the weapon of a mentally ill person on the premises.

The proposed draft does not envision, without first obtaining a search warrant, an officer entering the private homes of individuals to search for weapons without their

consent.

III. A question was raised that, even assuming passage of the proposed legislation, or some variation thereof, a mentally ill person could still gain access to another firearm. However, I.C. 35-47-2-7 currently provides in part that: (b) it is unlawful for a person to sell, give, or in any manner transfer the ownership or possession of a handgun to another person who the person has reasonable cause to believe:

- a) Has been convicted of a felony; or
- b) Is a drug abuser;
- c) Is an alcohol abuser; or
- d) Is mentally incompetent.

This section appears only to apply to handguns and “mental incompetent” . Amending I.C. 35-47-2-7 by replacing the phrase “is mentally incompetent” with the new phrase “mentally ill or gravely disabled” may be appropriate.

IV. What should be the ultimate disposition of seized weapons?

The proposed draft envisions returning firearms not owned by the mentally ill person to the rightful owner, so long as the rightful owner did not know or have reason to know that the mentally ill or dangerous person had access to their weapons. It is further the intent of the draft to have the weapons stored, with the authority of the court to order their return to the individual following a hearing on the status of the person’s mental illness and whether he/she is dangerous. However, a question arises as to how the government should proceed against weapons owned by a mentally ill person when it is determined that the mentally ill person ought not be entitled to their return. Should the guns be forfeited to the government, stored indefinitely, sold at public auction or destroyed?

Indiana Law currently authorizes the confiscation and sale or destruction of firearms confiscated from a person who was convicted of an offense for which the confiscation was made. See I.C. 35-47-3-1 and 35-47-3-2. However, the mental health

confiscations are likely to occur in situations in which the individual was transported to a hospital for treatment in lieu of prosecution, or the weapons were confiscated for the person's own safety and no crime was being committed. Therefore, forfeiture and public auction may appear overreaching. The current draft suggests storing the firearm at public expense as an option.

V. Should an individual be forced to pay court costs to challenge the seizure? The proposed draft suggests that "any interested party claiming ownership in the weapons may file an action requesting return of the property at any time, without payment of court costs.

VI. Is allowing the government to retain seized weapons of a mentally ill person for 180 days excessive? The proposed draft suggests a 180 day maximum period, unless a court orders otherwise. The intent of the draft is to allow any person claiming an ownership in the weapon, including the mentally ill person, to challenge the seizure and request a return of the firearm at any time.

VII. Is it necessary to specify which Courts have jurisdiction? I.C. 12-26-1-2 currently provides....the following Indiana Courts have jurisdiction over a proceeding under this article:

1. A Court having probate jurisdiction.
2. A Superior Court in a county in which the Circuit Court has exclusive probate jurisdiction.
3. A mental health division of a Superior Court to the extent the mental health division has jurisdiction under I.C. 33-5-1-2-4.

The current draft suggests no changes with respect to jurisdiction.

Proposed Draft

I.C. 12-26-4.1-1 Law Enforcement Officers; authority to seize firearms.

Section I. A law enforcement officer, having probable cause to believe that an individual is mentally ill, dangerous, gravely disabled, or in need of immediate hospitalization or treatment for mental illness, may seize any of the following items:

1. Any firearms owned by the individual.
2. Any firearms used by the individual in a dangerous, irresponsible or threatening manner.

I.C. 12-26-4.1-2 Procedure Upon Seizure.

(A) When firearms are seized under this chapter, the law enforcement agency making the seizure shall, pending final disposition:

1. Retain the property in a secure location; and
2. File a report with the Prosecuting Attorney of the county in which the seizure occurred.

(B) Firearms that are seized under this section are not subject to replevin but shall be considered to be in the custody of the law enforcement agency making the seizure until a Court orders otherwise.

I.C. 12-26-4.1-3. Hearings for the Return or Forfeiture of Firearms.

(A) Firearms seized pursuant to this chapter may be retained by the law enforcement agency for a period of 180 days, unless otherwise ordered by a Court in the jurisdiction where the seizure occurred.

(B) Any action involving the seized firearms shall be commenced by the filing of a complaint in a Court in the jurisdiction where the seizure occurred.

(C) The Prosecuting Attorney of the jurisdiction where the seizure occurred shall, within 180 days of the seizure, file an action seeking instructions from the Court as to the final disposition of the firearms. Any interested party claiming ownership in the

firearms may file an action requesting the return of the property at any time without the payment of Court costs.

(D) The action shall be brought:

- a) In the name of the State or law enforcement agency who made the seizure; or
- b) In the name of the person alleged to be the rightful owner of the property.

(E) The Prosecuting Attorney shall have the burden of proof to establish the following by a preponderance of the evidence:

1. A law enforcement officer had probable cause to believe the individual from which the firearms were seized was mentally ill, dangerous, gravely disabled or in need of immediate hospitalization or treatment for mental illness; or
2. The firearms seized were being used by the individual in a dangerous, irresponsible or threatening manner.
3. If an individual, other than the person from whom the firearms were seized, claims an ownership interest in a weapon, the Prosecuting Attorney must further prove the owner knew or had reason to know that the mentally ill, gravely disabled or dangerous person had access to the firearms.

(F) An individual claiming an ownership interest in a seized firearm has the following rights:

1. To receive adequate notice of a hearing.
2. To receive a copy of the petition or any documents filed with the Court.
3. To be present at the hearing and present evidence.
4. To be represented by counsel. The Court has the authority to appoint a public defender or guardian ad litem for a person alleged to be mentally ill or gravely disabled.

(G) If the Prosecuting Attorney fails to meet the burden of proof, the Court shall order the property released to the owner.

(H) If the Court enters a Judgment in favor of the State, the Court shall enter an order for the final disposition of the firearms. Said order may:

1. Authorize the continued seizure of the firearms by the law enforcement agency until further order. Orders authorizing the continued seizure of firearms at public expense shall be set for further review hearing every 180 days.

2. Authorize the return of the firearm to the rightful owner on the condition that reasonable precautions are taken to protect public safety.

3. Authorize the mentally ill person to transfer the firearm to a proper person.

4. If the Court finds the person is mentally ill, dangerous or gravely disabled; and the person's condition is such that returning the firearm would present a danger to any person, the Court shall enter an order of forfeiture against the firearms. Firearms forfeited under this chapter shall be destroyed by the law enforcement agency.

(I) Upon receipt of a forfeiture order authorizing the destruction of the firearms, the law enforcement agency shall promptly destroy said firearms and file a return on said order with the Court.

